Supreme Court, U. S.
FILED
SEP 29 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-440

COUNTY OF SONOMA, EUGENE D. WILLIAMS, individually and in his official capacity as County Clerk, MABEL TONKIN, individually and in her official capacity as Clerk of Municipal Court, HERB SNYDER, individually and in his official capacity as County Recorder, VICTOR MARTINEZ, individually and in his official capacity as Head of the Collections Department,
Petitioners

vs.

EVA ISBELL, CLEVIE PEARSON and OMEGA PEARSON,
Respondents

BRIEF OF AMICI CURIAE
The Carpenter Trust Funds for Northern California, in Support of County of Sonoma's Petition for Writ of Certiorari to the California Supreme Court

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September 28, 1978.

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OPINION BELOW

The opinion of the California Supreme Court is reported at 21 Cal.3d 61, *rehrg. denied as modified,* 21 Cal. 3d 561(a) (1978).

QUESTION PRESENTED

Whether the California Confession of Judgment Statute is violative of the Fourteenth Amendment of the United States Constitution on its face or as applied to the facts in this case.

INTEREST OF AMICI CURIAE, THE CARPENTER TRUST FUNDS FOR NORTHERN CALIFORNIA, IN THE CASE AT BAR

The Carpenter Trust Funds for Northern California[1] are express trust funds created under written agreement pursuant to Section 302 of the Labor Management Relations Act (29 U.S.C. §186), and they are multiemployer employee benefit plans under §§3 and 4 of the Employee Retirement Income Security Act (29 U.S.C. §§1002 and 1003). As multiemployer plans, the Carpenter Trust Funds deal with numerous contractors and are often involved with suits to collect fringe benefit contributions. In the past, the Carpenter Trust Funds have extensively relied on the California Confession of Judgment Statute. The abrogation of that statutory scheme by the California Supreme Court has had a profound effect on the collection of fringe benefits by the Funds.

[1]The four Carpenter Trust Funds for Northern California are Carpenters Health and Welfare Trust Fund for California, Carpenters Pension Trust Fund for Northern California, Carpenters Vacation and Holiday Trust Fund for Northern California and Carpenters Apprenticeship and Training Trust Fund for Northern California. These four Trust Funds shall be referred to as the Carpenter Trust Funds or Carpenter Trust Funds for Northern California.

In this brief amici curiae will explain the business situation in which it has used confessions of judgment. More generally, it will be shown that the confession of judgment procedure has important economic and social benefits to the entire construction industry including property owners, contractors and construction workers. These benefits are lost if a formal lawsuit procedure must be utilized or if the confession of judgment procedures become so complex and unsure as to make a formal lawsuit a more practical alternative.

In spite of recent trends in consumerism regarding confessed judgments, the California legislature has continued to provide for a confession of judgment procedure in non-consumer, i.e., commercial transactions. The legislature has determined that this procedure has a socially beneficial use in many areas including, in the construction industry. Amici's concern is that the overly-broad ruling by the California Supreme Court will preclude the existence of any satisfactory confession of judgment statute. In effect, the California Supreme Court has ruled that confessions of judgment violate Fourteenth Amendment Due Process. That result conflicts with the United States Supreme Court's holdings on this issue. Amici urge that certiorari be granted in this case to resolve this conflict which is and will continue to be detrimental to the construction industry in California and throughout the United States.

ARGUMENT

I

THE IMPORTANCE TO THE CARPENTER TRUST FUNDS THAT THERE EXIST A VIABLE CONFESSION OF JUDGMENT PROCEDURE.

The Carpenter Trust Funds for Northern California are multiemployer employee benefit plans that cover geographically about three-fourths of the State of California. Each month slightly over 20,000 carpenters have hours reported to the Trust Funds; there is a total of 28,000 employer accounts of which 5000 are active at any given time. Thus, the Carpenter Trust Funds deal with numerous employers spread over a large geographic area who on the average employ very few carpenters. In short, the small construction outfit is the "norm".

At any given moment there are on the average 2100 accounts that have outstanding amounts due or are otherwise in some state of delinquency. Because of the very nature of the construction industry in California those delinquent accounts tend to be the small employer. The large construction companies calculate fringe benefit contributions as they would any other necessary cost and allocate the burden of those contributions at the time of bidding. The small contractor does not have the economic power, financial strength nor community reputation to operate in this fashion. The small contractor must bid on a job and hope that his bid is sufficient to cover all costs, including fringe benefits, leaving him with a profit.

The construction industry in California, as in the rest of the United States, is one in which there is a small profit

margin in relation to the cash-flow requirements. Therefore, a small contractor without some excess financial backing can get into financial trouble on a project even if the amount of his bid is sufficient to cover expected costs and to make a profit. Moreover, one serious reversal on a single project can cause a healthy small-time contractor to slip to the edge of solvency.

Unlike many creditors of the small contractor, the Carpenter Trust Funds are in the long run as interested in seeing that the small contractors stay in business as they are in collecting past-due fringe benefit contributions on a particular job. This is because as long as a small contractor stays in business he is providing jobs for carpenters. A bankruptcy would destroy both jobs and fringe benefit contributions. Thus, the Funds' attempt to keep an even keel between the twin poles of allowing an employer to continue in business and obtaining payment of past-due fringe benefit contributions. To this end the California Confession of Judgment Statute was utilized.

For the period of January 1, 1977 through May 31, 1978 the Carpenter Trust Funds had 213 accounts with confessions of judgment. In eighty-two judgment has been satisfied. Thirty-two accounts are current, while ninety-four are in various states of delinquency or full write-off. In terms of amounts collected, payment on promissory notes secured by confessions of judgment amounted to $674,000 or approximately 82% of all amounts collected by means of legal action. Thus, promissory notes secured by confessions of judgment have proven to be a tool upon which the Carpenter Trust Funds have heavily relied.

II

THE USE OF A NORMAL LAWSUIT IS NOT A SATISFACTORY ALTERNATIVE TO THE CONFESSION OF JUDGMENT PROCEDURE.

There are two reasons why a normal lawsuit is an unsatisfactory alternative for the Carpenter Trust Funds to a confession of judgment procedure. First, lawsuits tend to precipitate the economic collapse of a contractor with the accompanying loss of jobs for carpenters who are the beneficiaries of the Carpenter Trust Funds. Second, the costs of preparing and filing a full lawsuit is in the aggregate an expensive proposition. This legal expense will, of necessity, either be passed on to new homeowners and other property owners or be absorbed by individual carpenters in the form of less actual fringe benefits.

With regard to precipitating economic collapse, as it was stated earlier, the Carpenter Trust Funds as creditors of the small contractor have a different perspective than most creditors. Most creditors are interested in maximizing their return on the potentially bad debt owed by a contractor even if it means forcing eventual economic collapse. This is because most creditors have no interest in seeing a particular contractor continue to exist as a on-going, viable business.

The Carpenter Trust Funds, on the other hand, cannot be blind to the fact that a contractor as a viable employer provides jobs for the beneficiaries of the Trust Funds. Even contractors who fall into insolvency and bankruptcy will often after several years re-enter the construction industry as contractors. Therefore, it is in the best interests of the Carpenter Trust Funds to avoid forcing an employer into economic collapse.

A confession of judgment creates very few repercussions even if that confession of judgment is filed with the court. This is because other creditors tend to view a confession of judgment as a manner of securing payment on a promissory note and not as a sign of loss of confidence in that contractor. A normal lawsuit, however, is a symbol that the plaintiff has lost confidence in the debtor's ability to pay. This psychological difference occurs regardless of whether the lawsuit contains exactly the same information that the confession of judgment would have contained.

Another problem with normal lawsuits is that a plaintiff, such as the Carpenter Trust Funds, must protect against splitting its causes of action and other technical problems of pleading. Before a lawsuit is filed, an attorney must review the facts of the case much more extensively than is necessary with a confession of judgment. He may be forced by legal necessity to include other claims against the contractor although it may be to everyone's benefit to allow those claims to drift for the time being.

A licensed contractor has a license bond, and for individual jobs he may have obtained a payment bond. In a full lawsuit these bonds will also be named as defendants. This carries immediate repercussions with regard to a contractor's future ability to obtain proper bonding for licenses and jobs. Likewise, if there is a possibility of a mechanic's lien to secure the payment of fringe benefits, in a close situation, without the ability to obtain a con-

fession of judgment there will be a greater tendency to file the lien.

The filing of a normal lawsuit triggers a chain reaction that a confession of judgment avoids. In a lawsuit, additional parties are named, and additional claims are made, perhaps merely to be safe. This creates a picture of greater economic distress than may actually exist. Other creditors get worried, and the end result is an insolvent contractor who no longer provides any jobs or fringe benefits.

A contractor who enters into a confession of judgment does so with full knowledge of the possible consequences. It is the result of his choosing a course of action that is optimum for his business. The contractor knows that defending a lawsuit is expensive, and that if monies are owing, it is far cheaper to negotiate a settlement secured by a confession of judgment than to litigate the matter. Also, most contractors would prefer to keep a continued rapport with the Carpenters' Union and to do so requires that they make some effort to accommodate the claims of the Carpenter Trust Funds.

The confession of judgment procedure had a definite use in the construction industry in California. It was a manner of securing a debt without causing unwanted repercussions or unwanted litigation costs. The absence of the confession of judgment scheme will have an adverse impact on the entire industry including on the Carpenter Trust Funds.

The second reason why the Carpenter Trust Funds need and use a confession of judgment statute is the

savings in costs. First, filing fees are measurably higher for a full lawsuit ($46.50 vs. $15.00 in Superior Court). Second, there are the additional costs of a commercial process server whereas an employee of the Carpenter Trust Funds can obtain the contractor's signature on a confession of judgment. Finally, there is a significant increase in the amount of attorney time required to file a lawsuit as opposed to drafting a confession of judgment. Thus, the total costs of filing suit, even if a contractor is willing to agree to a stipulated judgment, totals at least two hundred and fifty dollars. A confession of judgment entails approximately only $50 in costs.

As noted previously, the Carpenter Trust Funds from January 1, 1977 through May 31, 1978 handled 213 confessions of judgment. Using confessions in these 213 cases represents a savings of over $40,000.00. That savings in legal costs went to increasing the quality of benefits that the carpenters received from the Trust Funds and to reducing the costs of new construction. If there is no confession of judgment statute, someone will have to pay for that additional $40,000 of legal costs.

As a side note, the United States Supreme Court has expressed concern over the extent of litigation occurring in the American courts and the extensive involvement of attorneys in the everyday workings of society. The abrogation of the California Confession of Judgment Statute increases the burden on the courts as well as interjecting attorneys into situations where lay people can readily handle the matter. In the end this "due process" decision appears more as a "make-a-job-for a-lawyer" decision which in the case of the Carpenter Trust Funds means

less fringe benefits for more money and/or higher construction costs.

III

NO PRACTICAL CONFESSION OF JUDGMENT STATUTE CAN BE DRAFTED TO COMPLY WITH THE CALIFORNIA SUPREME COURT'S DECISION, AND THIS RESULT IS CONTRARY TO WHAT THE UNITED STATES SUPREME COURT HAS HELD TO BE REQUIRED UNDER MINIMUM STANDARDS OF DUE PROCESS.

A party may validly waive notice and opportunity to be heard without running afoul of Due Process. *D. H. Overmeyer Co. v. Frick Co.*, 405 U.S. 174 (1972). To comply with due process and be valid the waiver must be voluntary, knowing and intelligent. *Id.* at 185-6. Thus, a confession of judgment statute complies with Due Process as long as it requires a valid waiver.

In the present case the California Supreme Court has paid lipservice to the *Overmeyer* decision while in fact holding, contrary to *Overmeyer,* that there can be no valid waiver of notice and opportunity to be heard consistent with Due Process. That result was achieved by stating that Due Process requires so much of a confession of judgment statute as to negate the possibility of drafting a workable statute that also complies with the decision.

It should be remembered that in abrogating the statutory scheme, the California court rejected a case-by-case approach, including an approach based upon the facts of the case before it. Instead it opted to hold that the statutory procedure on its face violated the Due Process

Clause of the Fourteenth Amendment. 21 Cal.3d 61, 64-65. It is because of this conflict between the California Supreme Court and the United States Supreme Court that the Writ of Certiorari should be granted.

In its decision the California court stated that in testing the validity of a confession of judgment a court may only rely on the document itself since there is no court hearing before a judge at the time the document is filed. 21 Cal.3d at 68. Next, it held that a confession of judgment document does not in itself demonstrate that the waiver was voluntary. *Id.* at 69. Finally, the court states that the debtor's signature on the document does not demonstrate that the waiver was knowing or intelligent. *Id.* at 70. Thus, without stating in so many words, the California Supreme Court holds that there must be a court hearing to validate the waiver. Possibly, the court may permit a waiver without hearing if it is accompanied by an affidavit showing that an attorney has been consulted. Under these requirements, it would be as easy or easier to obtain an agreed-upon consent judgment or default judgment as to obtain a confession of judgment. Furthermore, if the confession of judgment procedure becomes too complex or costly, then it is preferable to a creditor to file suit and obtain a consent judgment because it will be more insulated from post-judgment attack.

Implicit in the California Supreme Court's holding is that a creditor is prevented from relying on a valid out-of-court waiver by a debtor. This position offends our traditional notions of fair play and substantial justice. While due process may require that a waiver be demonstrably valid, due process also requires that a valid

waiver be binding. Also, the California Supreme Court held in its decision that confessions of judgment almost always involve a disparity in bargaining power. If such a disparity exists, then the waiver is not valid. *Id.* at 69. Creditors such as the Carpenter Trust Funds, under this holding, could never rely on even the most valid of valid waivers because inevitably they would be the "more powerful" parties. The concept of due process cannot require a result which clearly offends the most minimal notion of equal protection.

The California Supreme Court makes much out of the fact that any post-judgment remedies are too late because the existence of the judgment itself is harm to the debtor. Indeed, as this brief endeavors to point out, the mere filing of a lawsuit may result in harm. The possible harms in a given situation is a case-by-case concept, an approach which the California Supreme Court rejected in overturning the Confession of Judgment Statute.

In reaching its conclusion that available post-judgment relief in California is insufficient to comply with Due Process, the court relies on two points. First, the confession of judgment scheme had no requirement that a notice of entry of judgment be sent to the debtor's last known address. Thus, the California Supreme Court held that although a debtor has validly waived notice and opportunity to be heard he is still entitled to notice and opportunity to be heard. Due process does not require this Catch 22 position. Moreover, if the California Supreme Court truly felt that notice of entry of judgment would cure the defects in the scheme, it could have clearly so held. That would have resulted in an amendment to

the statute rather than a writ to the United States Supreme Court.

The second basis for rejecting post-judgment relief is that the scheme contained no procedure allowing a debtor to directly raise and litigate any defenses on the merits that he might have. Again, the California Supreme Court is indulging in circular semantics because a judgment by its very nature means finality. If every confession of judgment is subject to being re-litigated on the merits, then that judgment has no finality. Due process requires that once a valid waiver of notice and opportunity to be heard occurs, and judgment is taken against the person who made that waiver, that the judgment has as much finality as any other judgment. The California Supreme Court seems to be holding that creditors have no due process rights with regard to relying on the finality of a judgment.

CONCLUSION

It has been shown that the confession of judgment procedure is extremely important to these amici curiae and has important and valid uses in the construction industry in California. Under its *Overmyer* decision, the United States Supreme Court has held that consistent with due process there may be a valid confession of judgment statute. The California Supreme Court in the case at bar has held that Fourteenth Amendment Due Process effectively bars a practical confession of judgment procedure. Writ of Certiorari should be granted in this case to resolve this conflict between the California Supreme Court and the United States Supreme Court.

By granting certiorari the United States Supreme Court will have an opportunity to define more sharply what due process requires of a confession of judgment statute. This would have a positive effect not only in the most populous state in the Union, but also throughout the nation.

Respectfully submitted,

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September 28, 1978.